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SOUTH AFRICAN NATIONAL PARTY'S CONSTITUTIONAL PROPOSALS

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THE NATIONAL PARTY'S CONSTITUTIONAL PROPOSALS

The constitutional proposals of the National Party 1/ must be seen in the context of South African history. This history has been one of White domination and Black disempowerment. White-controlled Governments have pursued policies of segregation and discrimination regarding the ownership and occupation of land, education and the provision of social services. Until comparatively recently labour policies were directed towards excluding Blacks from skilled occupations and forcing them into a system of migrant labour. The legacy of this system is still with us. A significant number of Black workers continue to be migrants and the great majority of Black workers are unskilled. Over 80 per cent of the land is still owned by Whites who control the economy and, still, the political process.

Apartheid policies forced Blacks into inferior positions in society and created a Black underclass, the overwhelming majority of whom are landless, unskilled and impoverished. Hundreds of thousands of Black people live a precarious existence in informal settlements on the fringes of large cities. Until now Blacks have been denied the vote, and have been unable to address these issues through the political process.

The National Party acknowledges that the new society must be one that is free from apartheid and enables all South Africans to share in peace, progress and prosperity. To free South Africa from apartheid more will be required than the repeal of race legislation. The legacy of apartheid must also be addressed. Peace, progress and prosperity will only be possible if those who have been the victims of apartheid are able to see that the new society differs materially from the old, and that a genuine attempt is being made to meet their basic needs for jobs, shelter, nutrition, health and education. It is crucial, therefore, that the constitutional structures of the new South Africa should not facilitate the preservation of White privilege or frustrate the ambitions of those who have fought for their freedom for so long and under such difficult conditions. This is what could happen if the proposals of the National Party are adopted.

Negative power to block decisions

In effect the proposals call for government by consensus. Implicit in consensus is the negative power to block decisions. The entrenchment of such power in a constitution, and its acquisition by any political grouping able to command sufficient support for its policies at an election, which seeks to retain White privilege and to frustrate Black advancement, would result in the retention of many apartheid practices and structures that

have been built up over a long period of time. These practices and structures are the result of prolonged and institutionalized racial discrimination, and will require positive action by the State if they are to be redressed in any meaningful way.

At the executive level the proposals call for a Presidency consisting of the leaders of the three largest parties, or up to five, if the three largest parties do not command 50 per cent of the votes. The Presidency is required to function under a rotating chairmanship and to take its decisions by consensus. The cabinet is required to be a multi-party body, appointed by the Presidency - also by consensus - with the function of carrying out the policy of the Presidency. In effect this proposal means that executive decisions can be blocked by the veto of the leader of the third largest party (or fifth largest party if five are to be included).

The impact of this provision can be illustrated by an example. Assume that at the first election the three top parties gain 60, 20 and 10 per cent of the vote, respectively. Under the National Party's proposal the party with 10 per cent of the votes can block policies that parties commanding 80 per cent of the votes wish to pursue. If the 10 per cent have been elected with a mandate to preserve White privilege as far as possible, legitimate attempts to pursue policies of reconstruction and to eliminate the legacy of apartheid could be frustrated.

Legislative proposals favour minority

The same flaw exists in the legislative proposals. Although provision is made for a legislative assembly to be elected by proportional representation, a bicameral system is proposed, in which a second house is required to give its approval to bills passed by the legislative assembly. The second house is to be elected on the basis of regional representation, but in each region any party polling more than a minimum percentage of the regional vote will be allocated the same number of seats. The minimum percentage is not stated, but whatever it may be, it will put all parties who pass the minimum point on an equal basis, irrespective of the votes that they actually receive. This not only favours minority parties over the majority party, but also encourages the fragmentation of political formations so as to achieve the maximum advantage from the disproportionate allocation of seats. For example, posit that the cut-off point is 10 per cent, and the poll produces the following results: party A, 60 per cent; party B, 20 per cent; and party C, 10 per cent. Parties B and C, who together have only 30 per cent of the total regional vote, will have double the regional representation of party A, which gained 60 per cent of the vote. If this pattern is repeated more or less in all the regions, parties B and C together will be able to block all legislation proposed by

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party A, despite the fact that party A commands 60 per cent of the total vote.

But this is not all. The Nationalist proposal requires special types of legislation to be passed with a weighted majority in the second house. The special types of legislation are defined as being legislation relating to the interests of minorities, the interests of regions, entrenched provisions of the constitution, and amendments to the constitution. It is suggested that the weighted majority which will be required might be a two-thirds majority. Latent within the vague concepts of interests of minorities, interests of regions, and entrenched provisions, are important features for the old apartheid system. Existing structures involving ethnic divisions, segregation in education, and occupation of land, and other aspects of segregation in education, and occupation of land, and other aspects of White privilege could be defended by some of the parties as interests which are entitled to protection under these provisions. The weighted majority and the disproportionate allocation of seats to minorities could make it impossible to pass legislation dealing with such matters against the wishes of a party that might command as little as 10 per cent of the national vote.

Regional legislatures are to function on the basis that there will be decision making procedures to provide for the protection of minority interests and certain circumscribed matters. The minority interests and circumscribed matters are not defined, nor are the special procedures according to which decisions are to be made. It is proposed that the regional legislatures be constituted by votes on a proportional representation system, but in addition, that there should be indirect nomination of members by local authorities. The manner in which this indirect representation is to be effected, and the proportion of the total regional legislature that it will represent, is not indicated. The regional executives are to be composed and to function in the same way as the Presidency - i.e., by multi-party consensus. The insistence that there be executive consensus and special procedures to deal with minority interests and circumscribed matters reflects once again an intention to enable small groupings to block executive action and legislation with which they do not agree.

Local government is to be vested in city councils to be elected on a basis which has regard both to the interests of lawful residents and the particular interests of owners, lessees and rate payers. It is said that the allocation of wards should be effected on the basis of property values and voting numbers. It is also suggested, as an example, that half the city councilors should be elected by a voters roll consisting of all residents and the other half by a voters roll containing only the

names of owners, lessees and rate payers. It is not clear whether this is an elaboration of the ward system in which allocation will be made on the basis of property values and voting numbers, or whether this is an additional or alternative suggestion. Whatever the true position may be, the proposals indicate a clear intention to favour people with property interests over other voters. People in low density living areas (Whites) will be preferred over people in high density living areas (Blacks) and people in formal houses (Whites and some Blacks) will be preferred over people in informal housing (Blacks). In addition, it is said that special decision making procedures such as increased majority votes will be required in respect of certain circumscribed sensitive matters. This is consistent with the framework proposals for central and regional government.

Within the proposed structure of local government, however, there is a proposal that is inconsistent with the underlying theme of consensus. It is a proposal that within the boundaries of a city council there may be constituted neighbourhood councils that can come together on a voluntary basis within any geographical area of the local authority. The neighbourhood councils are to be elected by the residents of the neighbourhood and to be vested with autonomous power over neighbourhood matters such as the regulation of norms and standards for residential environment, the granting of licences/permits in regard to the use of property, the provision of communal facilities, security matters and civil protection, and matters that may be allocated to a neighbourhood council in terms of other legislation, for example education and welfare. Here consensus is no longer the criterion, but autonomy is given to neighbourhood groups to deal with matters within identified spheres of power, and to raise money from the residents of the neighbourhood (presumably by tax) for that purpose. In this manner enclaves of privilege can be preserved by law.

Constitutional proposals neither democratic nor practical

Central, regional and local government is to take place within a system of devolution of power that will prevent any of the three tiers of government functioning in areas allocated to the other tiers of government. What is proposed is a multiple federal system with original power being devolved right down to local structures. The fragmentation of power and the insistence on consensus and special majorities will make for weak government, favouring any political grouping that chooses to pursue policies directed toward the preservation of White privilege in substance if not in form, and adding to the difficulty of genuine attempts to dismantle apartheid.

The proposals also indicate a commitment to a constitutional State built around a bill of rights, a commitment to recognizing free and autonomous fields of interest in non-governmental activities, and a willingness to enter into negotiations with the Transkei, Bophuthatswana, Venda and Ciskei in regard to their future relationship with South Africa. The concept of a constitutional state with a bill of rights and recognition of civil society are not contentious, though they could possibly become so, if presented in a manner designed to preserve White privilege. Transkei, Bophuthatswana, Venda and Ciskei are regarded by the international community as part of South Africa and it is correct that they should be treated as such in the constitution.

In a publication entitled "Constitutional Rule in a Participatory Democracy", the National Party acknowledges that the new dispensation should be free from apartheid and discrimination in any form, and should be based on universal franchise in a democratic structure of government. The structure that it puts forward to achieve these goals is, however, neither democratic nor likely to free South Africa from the legacy of apartheid. It seems to be concerned principally with another goal identified in the publication, namely, that the new society should be free from domination and should also accommodate the cultural differences in South Africa.

Domination must be distinguished from majority rule. Democracies function on the basis of parliamentary majorities. It is only if a majority acts oppressively toward minorities that it is appropriate to talk about domination. What a constitution needs to do is to prevent such oppression. There can be no objection in principle to the inclusion in the constitution of mechanisms designed to secure protection for the legitimate interests of minorities in South Africa. The constitutional form through which this is ordinarily done is to identify basic freedoms which require protection, including religious and cultural freedoms, and to guarantee such protection through an entrenched bill of rights, under which legislation and executive action are made subject to judicial review by an independent judiciary. Protection against domination, and the accommodation of cultural differences, can be and usually are dealt with through a bill of rights and related mechanisms. But to go further and to require, in effect, as the National Party's proposals do, that legislation and executive action can only be undertaken if minorities give their consent thereto, is neither democratic nor practical.

The constitutional proposals of the National Party fragment power at every level of government. They involve mechanisms that call for weighing of voting, special majorities for legislation, and consensus of all parties with significant representation for

executive action. In their application these proposals could result in the perpetuation of the unequal power relations that are the consequence of apartheid. It is this that will make them unacceptable to the majority of the population.

Notes

1/ Made public on 6 September 1991 by President F. W. de Klerk for a new post-apartheid constitutional structure for South Africa.

Courtesy of the Centre against Apartheid